A

Public Prosecutor v Ng Mee Yee & Anor

B HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO WA-45A-11–03 OF 2019
ASLAM ZAINUDDIN J
18 MAY 2022

C *Criminal Law — Dangerous drugs — Trafficking — Both accused charged under s 39B(1)(a) of Dangerous Drugs Act 1952 read together with s 34 of Penal Code — Whether there were discrepancies in weight of impugned drugs — Whether both accused had custody, control and knowledge of impugned drugs — Whether both accused had possession of impugned drugs — Whether common* D *intention established — Whether prime facie case established — Whether witness was material witness — Whether non-calling of witness fatal to prosecution's case — Whether both accused rebutted presumption under s 37 of Dangerous Drugs Act 1952 — Whether prosecution proved case beyond reasonable doubt* E *— Criminal Procedure Code s 112 — Dangerous Drugs Act 1952 ss 2, 37(d) & 39B(1)(a) — Penal Code s 34*

This was a drug trafficking case occurred in a premise located in Dang Wangi, Kuala Lumpur ('the said premises'). The raiding officer ('PW3') who led a F police party and accompanied by the second accused went to the said premises, but the door was locked. Thereafter, the door was opened by the first accused and upon searching, the police discovered the impugned drugs in a cupboard. The investigating officer ('PW4') sent the impugned drugs to the Chemistry Department for analysis and the chemist ('PW2') confirmed that the G impugned drugs contained 777.3g of methamphetamine. Both the accused were then charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code. In defence, the first accused argued that the said premises was accessible to other persons and was not selected by them but by one Alam instead and therefore in a short span H of time, it was impossible for the first accused to have knowledge about the impugned drugs. The second accused submitted that prior to their moving to the said premises, it was occupied by another person.

Held, convicting both the accused for the charge of drug trafficking, and I sentencing both the accused to death:

(1) In order for the prosecution to establish a prima facie case for the trafficking charge against the first and second accused, it was necessary for the prosecution to prove the following three elements of the offence under s 39B of the Act. Firstly, the drugs involved must be a dangerous

drug as specified in the First Schedule of the Act. Secondly, the drugs were in the possession of the first and second accused. Thirdly, both accused were trafficking the said drugs. In the present case, the court found that the prosecution had successfully established the said elements and consequently had established the prima facie case against both the accused (see paras 16 & 39).

(2) In the 'Borang Serah/Terima Barang Kes' ('exh P17'), PW3 stated in his sworn evidence, the gross weight in item No 2 was a total of 1030g suspected to contain illegal drugs ie methamphetamine. PW2 stated the net weight of the impugned drugs sent by PW4 for analysis was 1018.7g of methamphetamine. PW2 confirmed upon analysis that the impugned drugs contained 777.3g of methamphetamine, the subject-matter of the charge. The court accepted that PW2 was a qualified person who had undertaken a methodical analysis of the impugned drugs to determine its identity and weight in accordance with the rules and procedure issued by the Chemistry Department. The court was of the view that from the evidence of the prosecution's witnesses, there were no discrepancies and serious doubt as to the weight of the impugned drugs (see paras 18–19).

(3) Evidence was presented before the court that it was the first accused who opened the door and subsequently let PW3 and his team enter the said premises. Upon entering, at that material time, there were no other individuals in the said premises. The impugned drugs were found in a cupboard. Suffice to say, this fact proved both the accused had possession over the impugned drugs. Further, based on the testimony of PW3 that both the accused were in a scared and nervous state at the time the raid was conducted by the police party, and the fact that the second accused even knelt down and begged the police party not to arrest him, the court was satisfied that the first and second accused had custody, control and knowledge of the impugned drugs which were found in the said premises (see paras 28 & 32).

(4) The court invoked the statutory presumption under s 37(d) of the Act to establish that the first and the second accused had possession of the impugned drugs found in the said premises and had knowledge of the same. This together with the definition of trafficking in s 2 of the Act which included 'keeping' or 'concealing' completed the ingredients of the offence (see para 33).

(5) Based on the evidence produced before the court, the prosecution had established common intention between the first and the second accused as regard to the charge preferred against them. It was proven that both the accused had possession over the impugned drugs. When it involves two or more persons, if they intentionally do a thing jointly, it is just the same as if each of them had done it individually (see para 34).

(6) The defence of the first accused was an afterthought and constituted a bare denial. Based on the evidence, the first accused admitted that she was the girlfriend of the second accused and that she stayed in the said premises. Regardless of her defence that the blame was for Alam to bear, but here both the accused accepted Alam's recommendation of moving to the said premises. Hence, it was illogical and unbelievable for the court to accept her version that she had no knowledge of the drugs found. Further, the fitting exercise of the t-shirt and trousers showed a positive match with the first accused and ergo the first accused was an occupant of the said premises. Consequently, the first accused had the power of disposal over the impugned drugs (see para 51).

(7) The defence of the second accused was an afterthought and constituted a bare denial. The court accepted the evidence of PW3 that at the material time, the second accused brought the police team to the said premises. Furthermore, the fitting exercise of the t-shirt and trousers showed a positive match with the second accused and considerably he was one of the occupants of the said premises. It was a strong allegation by the second accused that the police fabricated the fact that the second accused knelt down and cried upon the discovery of the drugs. The court found that the allegation was absurd. The court also found that the testimony of PW3 was credible and that PW3 had no mala fide intention against the second accused. The court fully accepted the evidence of PW3 that at the material time, the second accused was with the first accused in the said premises (see para 52).

(8) In relation to the failure to record the statement of one Alam and consequently put Alam on the stand, the court found that the statement under s 112 of the Criminal Procedure Code tendered by the prosecution was sufficient and the court accepted the said statement. The court found that Alam was not a material witness who could unravel the narrative of the case or answer questions in the mind of the defence. The role of Alam was not more than that of a house agent who assisted the first and second accused to find another suitable unit for them to occupy. Hence, the non-calling of Alam as one of the prosecution witnesses was not fatal to the prosecution's case (see para 53).

(9) In the totality of the evidence, the prosecution had successfully proved its case beyond reasonable doubt against the first and second accused. For the aforesaid reasons, the court found both the accused had failed to raise a reasonable doubt in the prosecution's case and had failed to rebut the presumption of possession stated in s 37(d) of the Act on a balance of probabilities (see para 62).

[Bahasa Malaysia summary

Ini adalah kes pengedaran dadah yang berlaku di sebuah premis yang terletak di Dang Wangi, Kuala Lumpur ('premis tersebut'). Pegawai serbuan ('PW3') yang mengetuai pasukan polis dan diiringi oleh tertuduh kedua telah pergi ke premis tersebut, tetapi pintunya berkunci. Selepas itu, pintu telah dibuka oleh tertuduh pertama dan selepas menggeledah, polis menemui dadah yang disangkal di dalam sebuah almari. Pegawai penyiasat ('PW4') menghantar dadah tersebut ke Jabatan Kimia untuk dianalisa dan ahli kimia ('PW2') mengesahkan dadah tersebut mengandungi 777.3g methamphetamine. Kedua-dua tertuduh kemudiannya dituduh atas kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dibaca bersama s 34 Kanun Keseksaan. Dalam pembelaan, tertuduh pertama berhujah bahawa premis tersebut boleh diakses oleh orang lain dan premis tersebut bukan pilihan mereka tetapi sebaliknya premis tersebut dipilih oleh seorang yang bernama Alam dan oleh itu dalam jangka masa yang singkat, adalah mustahil untuk tertuduh pertama mempunyai pengetahuan tentang dadah tersebut. Tertuduh kedua berhujah bahawa sebelum mereka berpindah ke premis tersebut, ia telah diduduki oleh orang lain.

Diputuskan, mensabitkan kedua-dua tertuduh atas tuduhan mengedar dadah berbahaya dan menjatuhkan hukuman mati ke atas kedua-dua tertuduh:

(1) Bagi membolehkan pihak pendakwaan membuktikan kes prima facie bagi pertuduhan pengedaran dadah terhadap tertuduh pertama dan kedua, adalah perlu bagi pihak pendakwaan untuk membuktikan tiga elemen kesalahan berikut di bawah s 39B Akta tersebut. Pertama, dadah yang terlibat mestilah dadah berbahaya seperti yang dinyatakan dalam Jadual Pertama Akta tersebut. Kedua, dadah tersebut berada dalam simpanan tertuduh pertama dan kedua. Ketiga, kedua-dua tertuduh mengedar dadah tersebut. Dalam kes ini, mahkamah mendapati bahawa pihak pendakwaan telah berjaya membuktikan elemen-elemen tersebut dan seterusnya telah membuktikan kes prima facie terhadap kedua-dua tertuduh (lihat perenggan 16 & 39).

(2) Dalam 'Borang Serah/Terima Barang Kes' ('eksh P17'), PW3 menyatakan dalam keterangan bersumpahnya, berat kasar item No 2 ialah sejumlah 1030g yang disyaki mengandungi dadah berbahaya iaitu methamphetamine. PW2 menyatakan berat bersih dadah tersebut yang dihantar oleh PW4 untuk dianalisa ialah 1018.7g methamphetamine. PW2 mengesahkan selepas dianalisa bahawa dadah yang disangkal tersebut mengandungi 777.3g methamphetamine, iaitu subjek pertuduhan semasa. Mahkamah menerima bahawa PW2 adalah orang yang berkelayakan yang telah menjalankan analisis berkaedah ke atas dadah yang disangkal tersebut untuk menentukan identiti dan beratnya mengikut peraturan dan prosedur yang dikeluarkan oleh Jabatan Kimia.

Mahkamah berpandangan bahawa daripada keterangan saksi-saksi pihak pendakwaan, tiada percanggahan dan keraguan serius terhadap berat dadah yang disangkal tersebut (lihat perenggan 18–19).

(3) Keterangan dikemukakan di hadapan mahkamah bahawa tertuduh pertama yang membuka pintu dan seterusnya membenarkan PW3 dan pasukannya memasuki premis tersebut. Setelah masuk, pada ketika itu, tiada individu lain di premis tersebut. Dadah yang disangkal tersebut ditemui di dalam almari. Cukuplah untuk mengatakan, fakta ini membuktikan kedua-dua tertuduh mempunyai milikan ke atas dadah yang disangkal tersebut. Selanjutnya, berdasarkan keterangan PW3 bahawa kedua-dua tertuduh berada dalam keadaan takut dan gementar ketika serbuan dilakukan oleh pihak polis, malah tertuduh kedua turut melutut dan merayu pihak polis supaya tidak menangkapnya, mahkamah berpuas hati bahawa tertuduh pertama dan kedua mempunyai jagaan, kawalan dan pengetahuan ke atas dadah yang ditemui di premis tersebut (lihat perenggan 28 & 32).

(4) Mahkamah menggunakan anggapan statutori di bawah s 37(d) Akta tersebut untuk membuktikan bahawa tertuduh pertama dan kedua memiliki dadah yang disangkal yang ditemui di premis tersebut dan mempunyai pengetahuan mengenainya. Ini bersama-sama dengan maksud pengedaran dalam s 2 Akta tersebut yang merangkumi 'menyimpan' atau 'menyembunyikan' melengkapkan ramuan kesalahan tersebut (lihat perenggan 33).

(5) Berdasarkan keterangan yang dikemukakan di hadapan mahkamah, pihak pendakwaan telah membuktikan niat bersama antara tertuduh pertama dan kedua berhubung pertuduhan yang dikenakan terhadap mereka. Telah dibuktikan bahawa kedua-dua tertuduh mempunyai milikan ke atas dadah yang disangkal tersebut. Apabila ia melibatkan dua orang atau lebih, jika mereka dengan sengaja melakukan sesuatu secara bersama-sama, ia adalah sama seperti jika setiap daripada mereka telah melakukannya secara individu (lihat perenggan 34).

(6) Pembelaan tertuduh pertama adalah pemikiran yang terkemudian dan merupakan penafian semata-mata. Berdasarkan keterangan, tertuduh pertama mengaku dia adalah teman wanita tertuduh kedua dan tinggal di premis tersebut. Walaupun pembelaannya menyatakan bahawa Alam harus dipertanggungjawabkan, tetapi di sini kedua-dua tertuduh menerima cadangan Alam untuk berpindah ke premis tersebut. Oleh itu, adalah tidak logik dan sukar dipercayai untuk mahkamah menerima versinya bahawa dia tidak mempunyai pengetahuan tentang dadah yang ditemui. Tambahan pula, pemakaian baju-t dan seluar menunjukkan padanan positif dengan tertuduh pertama dan oleh itu, tertuduh pertama adalah penghuni premis tersebut. Akibatnya, tertuduh pertama

mempunyai kuasa untuk melupuskan dadah yang disangkal tersebut (lihat perenggan 51).

(7) Pembelaan tertuduh kedua adalah satu pemikiran terkemudian dan merupakan penafian semata-mata. Mahkamah menerima keterangan PW3 bahawa pada masa yang material, tertuduh kedua membawa pasukan polis ke premis tersebut. Tambahan pula, pemakaian baju-t dan seluar tersebut menunjukkan padanan positif dengan tertuduh kedua dan dia adalah salah seorang penghuni premis tersebut. Tertuduh kedua telah mendakwa bahawa polis mengada-adakan fakta bahawa tertuduh kedua melutut dan menangis apabila dadah tersebut ditemui. Mahkamah mendapati dakwaan tersebut tidak masuk akal. Mahkamah juga mendapati keterangan PW3 adalah boleh dipercayai dan PW3 tidak mempunyai niat jahat terhadap tertuduh kedua. Mahkamah menerima sepenuhnya keterangan PW3 bahawa pada masa yang material, tertuduh kedua berada bersama tertuduh pertama di premis tersebut (lihat perenggan 52).

(8) Berhubung dengan kegagalan merekodkan kenyataan seorang yang bernama Alam dan seterusnya memanggil Alam untuk perbicaraan, mahkamah mendapati kenyataan di bawah s 112 Kanun Tatacara Jenayah yang dikemukakan oleh pihak pendakwaan adalah mencukupi dan mahkamah menerima kenyataan tersebut. Mahkamah mendapati Alam bukanlah saksi penting yang boleh merungkai naratif kes atau menjawab soalan dalam fikiran pembelaan. Peranan Alam tidak lebih daripada ejen hartanah yang membantu tertuduh pertama dan kedua mencari unit lain yang sesuai untuk mereka duduki. Oleh itu, kegagalan memanggil Alam sebagai salah seorang saksi pendakwaan tidak mencacatkan kes pihak pendakwaan (lihat perenggan 53).

(9) Dalam keseluruhan keterangan, pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan munasabah terhadap tertuduh pertama dan kedua. Atas sebab-sebab yang dinyatakan di atas, mahkamah mendapati kedua-dua tertuduh gagal menimbulkan keraguan munasabah dalam kes pendakwaan dan telah gagal untuk menyangkal anggapan pemilikan yang dinyatakan dalam s 37(d) Akta tersebut di atas imbangan kebarangkalian (lihat perenggan 62).]

Cases referred to

Balachandran v PP [2005] 1 CLJ 85; [2005] 2 MLJ 301; [2005] 1 AMR 321, FC (refd)

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)

Farose Tamure Mohamad Khan v PP & Other Appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (refd)

Gunalan Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189, CA (refd)

Henry Chan Kok Loon v PP [2017] MLJU 1191; [2017] 1 LNS 1174, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Looi Kow Chai v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
Pendakwa Raya v Denish Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209; [2008] 3 MLRA 116; [2009] 2 AMR 757, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Mohamed Ali [1962] 1 MLJ 257 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203, FC (folld)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356; [1969] 2 AC 256; [1968] 2 WLR 1303, HL (refd)

Legislation referred to

Criminal Procedure Code ss 112, 180, 180(1), 182A(1), 277
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B, 39B(1)(a), First Schedule
Penal Code 302

Mohd Isa bin Mohamed (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Hasnan Hamzah (with Qushwa Hasnan) (Hasnan Hamzah) for the first appellant.
Chiang Woei Chien (Chiang Chambers) for the second appellant.

Aslam Zainuddin J:

[1] Ng Mee Yee ('the first accused') and Ho King Lim ('the second accused') were charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge was marked as exh P2.

[2] The prosecution had called four witnesses to prove its case against both accused. At the end of the prosecution's case, the court upon a maximum evaluation of the credibility of witnesses and reliability of evidence adduced, ruled that the prosecution had successfully made out a prima facie case against the first and second accused for the preferred charge of drug trafficking. The list of witnesses called by the prosecution are as follows:

PW1 - Mohd Hafiz bin Rusli

PW2 - Rahman bin Mamat

PW3 - Inspektor Govind Kumar a/l Asokumar

PW4 - Inspektor Norbariah Fazuan binti Ramli

[3] Hence, the first and second accused were directed to enter their defence pursuant to s 180 of the Criminal Procedure Code. The list of witnesses called by both accused are as follows:

DW1 - The first accused

DW2 - The second accused

[4] At the end of the defence case, the court found the prosecution had successfully proven a case beyond reasonable doubt on the charge preferred against them. Hence, both accused were convicted and sentenced to death for the charge of drug trafficking.

[5] The charge proffered by the prosecution against both accused is as follows:

The charge (exh. P2):

Bahawa kamu bersama-sama pada 11.10.2018, jam lebih kurang 12.25 pagi di premis Unit 11-7, Taragon Time Service Unit, Jalan Changkat Thambi Dollah, dalam daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama telah mengedar dadah berbahaya iaitu methamphetamine seberat 777.3 gram. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama di bawah seksyen 34 Kanun Keseksaan.

[6] Now, the brief facts of the present case led by the prosecution is as follows.

[7] Related to a counterfeit money police report (Jinjang Report: 20133/18), on 10 October 2018 at about 12.25 in the morning, the raiding officer, PW3 (Insp Govind Kumar a/l Asokumar) led a party of police personnel accompanied by the second accused to the crime scene *id est*, Unit 11-7, Taragon Time Service Unit, Jalan Changkat Thambi Dollah, in the

district of Dang Wangi Wilayah Persekutuan Kuala Lumpur ('the said premises').

[8] Upon reaching the said premises, one of the police party found the door was locked. Later, the door was opened by the first accused. PW3 found papers and things related to counterfeit money. PW3 and his team entered the said premises and arrested one female, the first accused. At that instance, PW3 identified himself as a police inspector and a body search were conducted on both accused but found nothing incriminating.

[9] Upon further inspection, PW3 found four glass cylinders (exh P18A-D) on the table suspected to be used for drugs. The police team discovered one yellow plastic packet written 'Refined Chinese Tea wrapped with blue plastic packet written 'VINDA DELUXE in a cupboard. Upon opening the yellow plastic packet, the police team discovered one transparent plastic packet suspected to contain illegal drugs *id est* methamphetamine.

[10] Consequently, the first and second accused were arrested. Later on, PW3 prepared and handed over the accused persons together with the items seized to the investigating officer, PW4 (Insp Norbariah Fauzan bt Ramli) as per stated in exh P17.

[11] Following that, on 15 October 2018, PW4 sent the impugned drugs to the Chemistry Department for analysis by the chemist, PW2 (Encik Rahman bin Mamat). The report was tendered as exh P9. PW2, the chemist confirmed upon analysis that the impugned drugs contained 777.3g of methamphetamine, the subject-matter of the charges in exh P2.

THE COURT'S DUTY AT THE END OF THE PROSECUTION'S CASE

[12] Section 180(1) of the Criminal Procedure Code ('the CPC') provides that at the conclusion of the prosecution's case, the court shall consider if the prosecution has established a prima facie case against both accused. Section 180(1) of the Criminal Procedure Code states:

> 180 Procedure after conclusion of case for prosecution
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[13] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321, the Federal Court held that as an accused can be convicted on prima facie evidence, it must reach a standard which is capable of supporting a conviction. The Federal Court stated as follows:

[21] Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while s 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase 'prima facie case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a prima facie case has not been made out while s 180(3) provides that if a prima facie case has been made out the accused shall be called upon to enter his defence. A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* 11th Ed as:

> A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

[22] The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus, if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient

to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[23] As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However, it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[14] The Court of Appeal in *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89 held that:

In our respectful view, the correct test to be applied in determining whether a prima facie case has been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 270: 'To summarize, it would therefore appear that having regard to the prosecution evidence adduced so far, a prima facie case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of s 302 read with s 34 of the Penal Code? My answer to the question is in the negative'. We are confident in the view we have just expressed because we find nothing in the amended s 180(1) of the CPC that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s 180 when an accused elects to remain silent as happened in *Pavone v Public Prosecutor* [1984] 1 MLJ 77. In other words, we are unable to discover anything in the language of the recently formulated s 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.

It therefore follows that there is only one exercise that a judge sitting alone under s

180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[15] The steps that should be taken by the court at the close of the prosecution's case has also been set out in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 and *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1.

FINDING OF THE COURT AT THE END OF THE PROSECUTION'S CASE

[16] In order for the prosecution to make out a prima facie case for the trafficking charge against the first and second accused, it is necessary for the prosecution to prove the following three elements of the offence under s 39B of the Act. They are *firstly*, the drugs involved must be a dangerous drug as specified in the First Schedule of the Dangerous Drugs Act 1952. *Secondly*, the drugs were in the possession of the first and second accused and *thirdly*, both accused were trafficking the said drugs.

Whether the impugned drugs listed as a dangerous drug as specified in the First Schedule to the Act

[17] To begin with, the defence for the second accused argued that the chemist, Rahman bin Mamat ('SP2') had failed to specify the amount or weight of the drugs needed to be proven as per the charge. Since there is no explanation given by the prosecution, the burden of disproving the weight does not cross to the accused (whether the first or second or both) to disprove the weight of the drugs.

[18] At the outset, if we were to refer to *Borang Serah/Terima Barang Kes* (exh P17), PW3 stated in his sworn evidence, the gross weight in item No 2 was a total of 1,030g suspected to contain illegal drugs *id est* methamphetamine. PW2 stated the net weight of the impugned drugs sent by PW4 for analysis was 1,018.7g of methamphetamine. PW2 confirmed upon analysis that the impugned drugs contained 777.3g of methamphetamine, the subject-matter of the charge in exh P2.

[19] Here, I accept that PW2 is a qualified person who has undertaken a methodical analysis of the impugned drugs to determine its identity and weight in accordance with the rules and procedure issued by the Chemistry

Department. I am of the view that from the evidence of the prosecution's witnesses, there were no discrepancies and serious doubt as to the weight of the impugned drugs.

[20] I put reliance on the landmark case of *Gunalan Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189, wherein Abdul Hamid Mohamed JCA (as he then was) said:

> [41] First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.
>
> [42] The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tempering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.
>
> [43] The second period is from the time that it was received back from the chemist until it is produced in court. In my view, the chain of evidence is less important during this second period. This is because, as far as I am aware, there is no law that the exhibit recovered must be produced in court and if not the prosecution's case must necessarily fall. It may or it may not, again depending on the facts and the circumstances of each case. Even in a murder trial, the dead body is not produced in court. In *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 (FC) the body of the victim was not even recovered, yet the accused was convicted of murder. What the prosecution has to prove is that a particular person had died and the accused had caused his death. The death of the victim is not proved by looking at his remains in court, but by evidence of witnesses, the medical report, the identity card, the photographs and so on. Similarly, in a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist, there may be a gap in the chain of the people keeping custody of it subsequent to it having been analysed by the chemist until the date of trial, but so long as there is no doubt that the drug analysed by the chemist was the same one that was recovered in the case and it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed or the reason for the gap, there is no

reason why the prosecution's case should fall.

Whether the prosecution has successfully proven the element of custody and control

[21] At the end of the prosecution's case, it was submitted both accused persons had custody and control of the said drugs. It was argued by the prosecution that there were factors relevant for this court to take into consideration which are:

(a) both accused had custody and control of the impugned drugs found in the said premises. The impugned drugs were placed in a large envelope which can be seen by plain eyes. PW3 gave evidence, at the time the raid was conducted, there was no other person in the said premises except the first and second accused. The impugned drugs were found in a cupboard upon inspection by the police team;

(b) the fitting exercise of the t-shirt and trousers (exhs P19, P21 and P22) showed a positive match with the first accused;

(c) the fitting exercise of the t-shirt and trousers (exhs P20 and P24) showed a positive match with the second accused;

(d) both accused had exclusive access over the said premises and possession of the impugned drugs;

(e) PW3 testified both accused were in a scared and nervous state at the time the police party inspected the cabinet and thus, it can be inferred that the first and second accused had knowledge of the said drugs; and

(f) the fact that second accused knelt down begging the police not to take him to the police station when the impugned drugs were found, it can be inferred that the second accused had knowledge of the said drugs;

[22] The prosecution also relied on s 37 (d) of the Act and quoted the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337.

[23] Next, it was submitted by learned defence counsel for the second accused, the prosecution's evidence, did not fulfil any of the elements essential to prove the ingredient of possession both the physical element of custody or control nor the mental element of knowledge. The main contention of the defence was that neither of the accused actually prior to letting PW3 enter the said premises attempted to dispose the drugs. This fact clearly showed that they do not know about the drugs at all.

[24] At this juncture, defence for the second accused contended the prosecution definitely failed to present before this court, a sufficient and admissible evidence to prove that the first accused was in fact involved in trafficking of the said drugs.

[25] Next, learned counsel for the first accused submitted that according to PW3, the first accused had given full cooperation to the police team when the raid took place. The first accused did not try to dispose of the drugs when she took the keys and knelt down and begged to the police party not to arrest her. The investigating officer also admitted that without using a ladder, PW4 cannot see what was concealed behind the air-conditioner. Hence, the prosecution did not succeed in proving the elements of the charge against the first accused.

[26] Now, as to the second element of the offence, *id est* possession, this term has been defined by Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 as follows:

> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to

deal with the thing as his own had the intention of doing so. It is true that in prosecutions under the Dangerous Drugs Ordinance a lack of evidence in this connection may be made good by the statutory presumptions contained in that Ordinance. But there are no such presumptions in the Common Gaming Houses Ordinance nor are there any such presumptions in relation to possession of stolen property.

Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. And for this purpose as was pointed out by Gordon-Smith Ag CJ in the case of *Toh Ah Lam and Mak Thim v Rex* [1949] 1 MLJ 54, it is necessary to prove that the person in possession knows the nature of the thing possessed.

If the thing, as in *Toh*'s case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee*'s case, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[27] The pronouncement or postulation above is supported by the case of *Leow Nghee Lim v Reg* [1956] 1 MLJ 28, whereby Taylor J explained the phrase custody, control and possession as follows:

The word 'possession' is one of the most difficult of English words. It is derived from *posse* to be able and *sedere* to sit or occupy. The fundamental concept is power of occupation; primarily this referred to land and later the meaning was extended to power of user of a chattel. The primary lay meaning of possess is to hold as property, to own. The primary legal meaning of possess is to have possession, as distinct from ownership. This is well illustrated by the popular phrase for a sheriff's agent, 'A man in possession,' who really has only custody. Shakespeare more accurately called him a bum bailiff. In this Ordinance custody is distinguished, and I think 'possession' means possession irrespective of whether the possessor is the beneficial owner. Probably the most helpful definition of possession is:

> The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.

This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge. The patriarch Benjamin, *Genesis 44,* was clearly in possession of his sack of corn but he was not, in truth, in possession of the silver cup which had been 'planted' in it, entirely without his knowledge. The prisoner *Sleep* (1861) 8 Cox CC 472; Le & Ca 44; had a mixed

lot of copper bolts, some of which bore the Queen's mark. He knew he had copper bolts and therefore he was in possession of the whole lot. The question was whether he knew that some of them were so marked. How much a man knows about things in, or apparently in, his possession is a matter of fact, to be inferred from all the circumstances.

In some of the cases it has been said that without knowledge there can be no possession. In others, 'in possession' has been read as 'knowingly in possession' by application of the doctrine of *mens rea*. In some instances either view leads to the same result but not in all. The dicta do not make clear what degree of knowledge is meant. Also, in some of the statutes, 'possession' and 'knowledge' have been treated separately and much confusion has resulted.

The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him. The Ordinance deals both with opium and with other drugs. Possession of opium is prohibited absolutely.

Possession of drugs in general is not prohibited absolutely because many drugs are familiar household articles; it is only dangerous drugs which are prohibited. The special presumption as to knowing the nature will therefore seldom apply to opium; it will more frequently apply to other drugs. A man might know that he had a white powder, and therefore be in possession of a drug, but he might not know whether it was bicarbonate, a common household drug, or heroin, a dangerous drug of similar appearance. Such a case would resemble that of *Sleep* (1861) 8 Cox CC 472; Le & Ca 44. The distinction is not applicable in the present case but is mentioned here because counsel argued that the word 'possession' is used in different senses in the Ordinance. I do not think that is so. I think the word possession is used consistently in the Ordinance in its ordinary, but imprecise, sense.

It has also been said that intention to exercise the power of disposal is a necessary element of possession. This cannot be supported as part of a general definition. A woman is undoubtedly in possession of her wedding ring but as a rule she does not intend to dispose of it; many are buried wearing it. But she can pawn it, in case of need. Similarly with guilty possession. In general a thief intends to dispose of his loot but the rich collector who filched a rare stamp and the crazy artist who took the Mona Lisa, in order to gloat over them in private, were equally thieves. Intention is a separate matter.

The dictionary definition brings in the idea of exclusiveness. It is often said that 'possession must be exclusive.' This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.

Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often

due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[28] It is the duty of the court to make sure that there was credible evidence to prove each ingredient of the offence charged. Evidence was presented before this court that it was the first accused who opened the door and subsequently let PW3 and his team enter the said premises. Upon entering, at that material time, there were no other individuals in the said premises. The impugned drugs were found in a cupboard. Suffice to say, this fact proved both accused had possession over the impugned drugs.

[29] Now, the first accused repeatedly stated that she had given full cooperation to the police team when the raid took place. The first accused did not try to dispose of the drugs when she took the keys to open the grill. However, I beg to differ. The evidence indicates otherwise. As stated by PW3 in his sworn evidence, for instance, no other persons except the first and second accused were in the said premises at the time the arrest took place. The fitting exercise of the t-shirt and trousers (exhs P19, P21 and P22) showed a positive match with the first accused. As for the second accused, the fitting exercise of the t-shirt and trousers (exhs P20 and P24) showed a positive match with the second accused. Clearly from the sworn evidence of PW4, both the accused were a girlfriend and boyfriend couple. Consequently, this fact proved that the first and second accused had access to the said premises and that being so had possession over the impugned drugs. Accordingly, I find the prosecution has successfully proven that both accused had possession of the impugned drugs.

[30] Next, on the issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356; [1969] 2 AC 256; [1968] 2 WLR 1303, where Lord Wilberforce had this to say:

> In all such cases, the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence — of possession. It calls for an explanation: the explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession. Of course it would not be right, or consistent with the terms of the Act, to say that the onus of showing innocent custody rests upon the accused. The prosecution must prove the offence, and establish its ingredients. But one starts from the point that the Act itself has exempted the great majority of cases of innocent possession so that once the prosecution has proved the fact of physical control in circumstances not covered by an exemption and something of the circumstances in which this was acquired or held, this, in the absence of

explanation, may be sufficient to enable a finding of possession to be made. On the other hand, the duty to submit the question of possession to the jury in this way does give the opportunity of acquittal to innocent carriers and custodians, who can put forward an explanation of the physical fact which a jury accepts.

[31] It is incumbent upon me to scrutinize the entire evidence before the court to see whether an inference can be drawn against the accused persons that they were trafficking in the impugned drugs which were discovered in the said premises especially the evidence asserted by the prosecution at the close of its case, particularly the accused's conduct during the search wherein the impugned drugs were found in the cupboard.

[32] Having thoroughly gone through the evidence of the witnesses particularly the testimony of the raiding officer, PW3 who led the police team, that both accused were in a scared and nervous state at the time the raid was conducted by the police party, and the fact that the second accused even knelt down and begged the police party not to arrest him. Hence, I am satisfied that the first and second accused had custody, control and knowledge of the impugned drugs which were found in the said premises (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19).

[33] At this juncture, I invoked the statutory presumption under s 37(d) of the Act to establish that the first and the second accused had possession of the impugned drugs found in the said premises and had knowledge of the same. This together with the definition of trafficking in s 2 of the Act which includes 'keeping' or 'concealing' completes the ingredients of the offence.

[34] Based on the evidence produced before the court, I also find it is evident the prosecution had established common intention between the first and the second accused as regard to the charge preferred against them. It was proven both accused persons had possession over the impugned drugs. When it involves two or more persons, if they intentionally do a thing jointly, it is just the same as if each of them had done it individually. This principle was discussed in *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 where His Lordship Gopal Sri Ram JCA (as he then was) held as follows in relation to proof of 'common intention' (at pp 50–51):

> To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh AIR* [2001] SC 1344, Sethi J speaking for himself and Agrawal J said:
>
> > Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The

section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of an occurrence and on a spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.'

[35] I also refer to the Federal Court case of *Farose Tamure Mohamad Khan v Public Prosecutor & Other Appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769, where the court stated:

Common Intention

[47] It is helpful to analyse s 34 in terms of these elements:

(i) a criminal act;

(ii) participation in doing of the act;

(iii) ommon intention between the parties; and

(iv) the act must be done in furtherance of the common intention.

[48] At this juncture, it is convenient first to address the generally accepted principles of the operation of s 34. The position in respect of these elements is fairly uncontroversial, and the relevant principles gleaned from the authorities in Malaysia, Singapore and India can be briefly dealt with.

[49] It is widely acknowledged that s 34 is a rule of evidence which embodies the common sense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually (*Krishna Rao Gurumurthi v Public Prosecutor & Anor Appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603).

[50] If it is shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all, liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone (*Mahbub Shah v Emperor* [1945] 2 MLJ 144).

[51] The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of the (*Hari Ram v. State of Uttar Pradesh* [2004] 8 SCC 146). In those circumstances, the law makes no distinction between them or between the parts played by them in doing the criminal act (*Bashir v State* AIR 1953 All 668).

[52] Presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence (*Sabarudin Non v Public Prosecutor & Other Appeals* [2005] 4 MLJ 37; [2005] 1 CLJ 466 and *Manikumar Sinnappan & Ors v Public Prosecutor* [2017] 3 CLJ 505; [2015] 1 LNS

1344; [2016] 2 MLRA 1).

[53] Common intention, distinguished from the same or similar intention, requires proof that the criminal act was done in pursuance of a pre-arranged plan (*Mahbub Shah*). Such pre-planning may develop on the spot or in the course of the commission of an offence, the crucial test being the plan must precede the commission of the offence (*Namasiyiam Doraisamy v Public Prosecutor & Other Cases* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ Rep 241).

[54] A common intention may often be difficult to prove by way of direct evidence in practice, but it can be inferred from the circumstances of the case and the conduct of the accused (*Dato' Mokhtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101).

INCOMPLETE INVESTIGATION BY PW4

[36] It was submitted by learned counsel for the first and second accused that there had been a complete failure on the part of PW4 to conduct a proper, impartial investigation thereby depriving both accused the right to a fair trial. The defence submitted that PW4 failed to conduct dusting regarding the impugned drugs found, failed to send the exhibits for DNA testing and failed to record the statement of one Alam and consequently put Alam on the stand was obviously fatal to the prosecution's case. On the whole, PW4 has failed in her role to be diligent, fair and independent as required of an investigating officer.

[37] Contrary to this argument, I find that the version suggested by the defence is rather inherently improbable on the basis that it was established by the prosecution that both accused were the occupants of the said premises. There were no other persons arrested at the time of the raid. This fact proves that no other person had access to the said premises other than the first and the second accused (see *Leow Nghee Lim v Reg*, *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 and *Chan Pean Leon v Public Prosecutor*). Apart from that, the fitting sessions came out positively of both accused. For this reason, I find PW4 had done a thorough and complete investigation in this instant case. As for failure to put Alam on the stand, I find that the s 112 statement tendered by the prosecution ('exh P29') was sufficient and accepted by this court. Alam was not a material witness in this instant case who can unravel the narrative or answer questions in the mind of the defence. The role of Alam was not much more than that of a house agent who assisted the first and second accused to find another suitable unit for them to occupy. Hence, I find that the non-calling of Alam as one of the prosecution witnesses was not fatal to the prosecution's case.

[38] Furthermore, I agree with the prosecution's submission that the absence of forensic evidence like finger prints of both accused were irrelevant in the

instant case. Notably, the first and second accused were the occupants of the said premises and, that being so had possession and knowledge of where the impugned drugs were found (see *Leow Nghee Lim v Reg*, *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 and *Chan Pean Leon v Public Prosecutor*).

[39] Having said so, for the above reasons, I have considered all the evidence adduced by the prosecution, and subjected them to a maximum evaluation as laid down in the landmark case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* and I am satisfied that the prosecution had adduced credible evidence to successfully prove a prima facie case against both accused for the preferred charge against them. Again, I quote the Federal Court case of *Balachandran v Public Prosecutor* as follows:

> a 'prima facie case' is therefore one that is sufficient for the accused to be called upon the answer. This in turn means that the evidence must be such that it can be overthrown only by evidence in rebuttal … In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine the elements of the offence have been established.

[40] Pursuant to s 180 of the Criminal Procedure Code, the first and second accused were therefore called upon to enter their defence on the preferred charge. The first and second accused elected to give evidence on oath.

THE DEFENCE

[41] Now, briefly, the first and second accused person's defence is as follows:

The first accused

(a) the first accused admitted she and the second accused had a relationship as boyfriend and girlfriend;

(b) on 8 October 2018, the first accused together with the second accused rented a room (unit 6–3B), but found that the room was dirty and not comfortable to stay. Thereafter, the first and second accused sought the help of the house agent, Alam and requested for another cleaner room;

(c) on 9 October 2018, Alam brought both the first and second accused to unit 11–7 in the same building and they found that the said unit was cleaner compared to Unit 6-3B. However, the first and second accused noticed some men and women clothes were hanging inside the cupboard. Later on, Alam informed and promised them that his workers will sort out the matter;

(d) on the next day, the first and second accused agreed to move in to unit 11–7. However, they found that the items i.e the men and women clothes were still hanging inside the cupboard and were not removed as promised by Alam;

(e) following that, on 11 October 2018 at about 12.25am, the first accused heard a knock on the door and thought it was the second accused, and without hesitation, she hurriedly opened the grill and the door. However, she found out there were policemen who subsequently raided the premises. The policemen questioned her about the counterfeit money and thereafter found drugs; and

(f) the first accused denied having possession and knowledge of the impugned drugs found in the cupboard.

The second accused

(a) on 9 October 2018, the second accused rented a room unit 6–3B together with his girlfriend, the second accused only to find that the room was dirty. Both of them had requested to the management for a cleaner room and were shown Unit 11-7 on the next day;

(b) at about 18.00 hours, the second accused went out to buy some food and was arrested by the police. Later on, he was brought to IPD Sentul. He was informed by the police that he was in possession of counterfeit money;

(c) subsequently, the second accused brought the police team to unit 11–7 and upon inspection found the impugned drugs;

(d) the second accused denied that he knelt down to the police upon the discovery of the impugned drugs and begged to be released; and

(e) the second accused denied having possession and knowledge of the impugned drugs found.

ANALYSIS OF THE DEFENCE

[42] Learned counsel for the first accused contended that the defence version was consistent from the prosecution's stage that both the first and second accused initially rented unit 6–3B but found out that the unit was dirty. They then requested for a better and cleaner unit and was shown unit 11–7. Alam promised them that his workers will get rid of the items in unit 11–7 before they moved in but unfortunately Alam failed to do so. The defence submitted that unit 11–7 was not chosen by them but by Alam and therefore in a short span of time, it was impossible for the first accused to have knowledge about the impugned drugs.

[43] The defence also submitted that failure by the prosecution to call Alam to testify before the court was fatal to the prosecution case. The tendering of Alam's s 112 statement (exh P29) was definitely not sufficient as it cannot be cross-examined by the defence. The questions of who were the previous tenants and owners of the items in unit 11–7 and the persons who cleaned up the room and eventually the real culprit who possessed the impugned drugs would certainly be answered if one were to call Alam to give evidence before this court. Again, the learned counsel for the first accused contended that the s 112 statement was hearsay evidence and should not be accepted by the court.

[44] The defence also reiterated the lack of investigation by PW4 that there was no fingerprint of the first accused found on the impugned drugs and failure by PW4 to record statements of the individuals who helped the first and second accused to move in to unit 11–7. Hence, all of the above contention proved that it was impossible for the first accused to know the existence let alone possession of the impugned drugs. Learned counsel prayed that the first accused has raised reasonable doubt in the prosecution case and urged this court to acquit and discharge the first accused for the charge preferred.

[45] As for the second accused, the core defence laid down by the learned counsel was that the impugned drugs did not belong to him and that he had no knowledge of the said drugs. The defence submitted that the prosecution has failed to prove that the premises that the drugs were found is solely and exclusively controlled by the second accused, because there were other persons who had access to the unit including Alam and other persons staying there prior to the first and second accused occupying the unit. The prosecution failed to produce those individuals in court to ascertain if they are the real owners of the impugned drugs or not. Therefore, it is highly prejudicial to both accused as there is a possibility that the drugs found could belong to others.

[46] Learned counsel also contended that although the prosecution questioned if the accused had control over the unit, to which both the accused had answered in the affirmative. But having control and exclusive control is two different things. The second accused had control but did not have exclusive control of the unit. The defence also submitted that the second accused did not have any knowledge and that the evidence of the prosecution witness is totally not consistent.

[47] Furthermore, learned counsel submitted that the second accused had given full cooperation to the police when the police asked him to take them back to his place. Thus, it can be seen that the second accused did not know about anything about the drugs at all. The only additional evidence was that the raiding officer said when the drugs were discovered, the second accused knelt down and cried. This fact was strongly denied by the second accused and

A the defence submitted that it was fabricated by the police. Therefore, the only conclusion is that the second accused did not know about the existence of the drugs. Apart from that, DNA or fingerprint evidence was not provided by the investigating officer and it is highly prejudicial to the second accused. Hence, it was contended that the second accused has raised a reasonable doubt in the B prosecution case and that he ought to be acquitted and discharged at the end of the defence case.

[48] The prosecution on the other hand, submitted that the defence put forward by both accused was a bare denial and an afterthought. The version C illustrated by the defence that unit 11–7 was not cleaned and that there were items belonging to other persons was an afterthought defence which was never raised at the prosecution stage. Initially, the first and second accused stated in their evidence that unit 6–3B was dirty and that was the reason they requested D for another unit. Nevertheless, they moved in to unit 11–7 but also asserted the same that the unit was also dirty. Alam's s 112 statement stated that both the first and second accused mentioned unit 11–7 was ok to occupy and they decided to moved in to that particular unit. If unit 11–7 was not suitable for them, they should have told Alam in the first place but they failed to do so.

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[49] Additionally, the prosecution further submitted that Alam's role was only acting as the house agent and was definitely not a material witness in this instant case and hence his non-calling was not fatal to the prosecution case. On top of that, the prosecution's version was credible and that the impugned drugs F were found inside the said premises occupied by both accused. Hence, the defence raised by the first and second accused were a bare denial and should rightly be rejected by this court.

[50] Now, at the close of the defence, the court then embarked upon an G evaluation of the evidence on record as a whole, so as to give consideration to the entirety of the evidence in the context of both the prosecution and defence case.

[51] Having perused the defence laid down by the first and second accused, H I find that it was an afterthought and constituted a bare denial. I reject the version illustrated by the first accused that unit 11–7 was accessible to other persons and was not selected by them but by Alam instead and therefore in a short span of time, it was impossible for the first accused to have knowledge about the impugned drugs. At the time the police raided the said premises, the I first accused opened the door when knocked by the police and she was at the crime scene when the police confiscated the said drugs. I reject her evidence and I find that it was an afterthought defence for the first accused to escape the charge preferred against her. Having perused all of the evidence adduced, the first accused admitted that she was the girlfriend of the second accused and

verily stated staying in unit 11–7. Regardless of her defence that the blame was for Alam to bear, but here both accused accepted Alam's recommendation of unit 11–7 and that was the sole reason they moved from unit 6–3B to unit 11–7. Hence, it was illogical and unbelievable for the court to accept her version that she had no knowledge of the drugs found. Furthermore, the fitting exercise of the t-shirt and trousers (exhs P19, P21 and P22) showed a positive match with the first accused and ergo the first accused was an occupant of the said premises. Consequently, the first accused has the power of disposal over the impugned drugs.

[52] Moving on to the second accused, I agree with the prosecution that the version illustrated by the second accused was an afterthought and constituted a bare denial. The same argument put forward by the defence of the second accused that prior to their moving to unit 11–7, it was occupied by another person. I disagree on this point. I accept the evidence of PW3, the raiding officer that at the material time, the second accused brought the police team to the said premises. Furthermore, the fitting exercise of the t-shirt and trousers (exhs P20 and P24) showed a positive match with the second accused and considerably he was one of the occupants of the said premises. It was a strong allegation by the second accused that the police fabricated the fact that the second accused knelt down and cried upon the discovery of the drugs. I find that the allegation was absurd. I am of the opinion that the testimony of PW3 was credible and that PW3 had no mala fide intention against the second accused (refer the case of *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257). I fully accept the evidence of PW3, the raiding officer that at the material time, the second accused was with the first accused in the said premises.

[53] As for failure to record the statement of one Alam and consequently put Alam on the stand, I find that the s 112 statement tendered by the prosecution (exh P29) was sufficient and accepted by this court and Alam was not a material witness in this instant case who can unravel the narrative of this case or answer questions in the mind of the defence. The role of Alam was not more than that of a house agent who assisted the first and second accused to find another suitable unit for them to occupy. Hence, I find that the non-calling of Alam as one of the prosecution witnesses was not fatal to the prosecution's case.

[54] I refer to the oft quoted case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 on the meaning of possession in criminal law. I reiterate my findings in paras 26–33 on the issue of possession.

[55] In the Federal Court case of *Pendakwa Raya v Denish Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209; [2008] 3 MLRA 116; [2009] 2 AMR 757 (FC), Abdul Aziz Mohamad FCJ (as he then was) had this to say about exclusive possession:

A [17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] MLJ 28:

> ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.

Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[56] That being so, I find the first and second accused have failed to rebut the presumption under s 37(d) of the Act on a balance of probabilities. The accused persons have also failed to raise a reasonable doubt on the prosecution case. Based on the definition of trafficking in s 2 of the Act which stipulates eighteen acts which constitute trafficking, and 'keeping' or 'concealing' are two of them.

[57] Reliance is placed also on the Court of Appeal case of *Henry Chan Kok Loon v Public Prosecutor* [2017] MLJU 1191; [2017] 1 LNS 1174, where it was held by Zabariah Mohd Yusof JCA (as she then was) as follows:

> [57] Section 37(d) of the DDA, already provided a 'deemed
>
> state of affairs' (ie deemed possession and deemed knowledge). There is no longer the necessity for the prosecution to prove how these possession or knowledge were derived at. So long as there is already a finding of custody and control, the presumption is triggered. Since the learned Judge had already made a finding of custody and control of P66 and its contents, the Accused is deemed to have possession and knowledge. This has been illuminated by Chong Siew Fai CJ (Sabah and Sarawak) in *Muhammed Hassan v Public Prosecutor* [1998] 2 MLJ at p 273, delivering the judgment of the Federal Court:
>
> > The 'deemed state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessities to prove how the particular state of affairs is arrived at. There need only be established the basic or primary facts necessary to give rise to that state of affairs ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da) are sometimes described as 'compelling presumptions' in that upon proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make.

[58] For the foregoing reasons, I rejected the defence put forward by the first and second accused that the impugned drugs were not in their possession. The evidence presented by the prosecution against both accused was overwhelming. I find PW1, PW2, PW3, and PW4's testimonies were credible, direct and trustworthy and that the prosecution had successfully proven a case beyond reasonable doubt against the first and the second accused. Subsequently, the first and second accused had failed to raise a reasonable doubt in the prosecution's case.

FINDINGS OF THE COURT AT THE CLOSE OF THE DEFENCE CASE

[59] It is my duty at the close of the defence case as set out in s 182A(1) of the Criminal Procedure Code which states:

> Procedure at the conclusion of the trial
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[60] In the Federal Court case of *Balachandran v Public Prosecutor*, Augustine Paul JCA (as he then was) stated as follows:

> [23] As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However, it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[61] I am further mindful of the oft quoted case of *Mat v Public Prosecutor* [1963] 1 MLJ 263 that was affirmed by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 where Suffian J (later Lord President) held as follows:

> If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.
>
> The position may be conveniently stated as follows:

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt	Convict.
(b) If you accept or believe the accused's explanation	Acquit.
I If you do not accept or believe the accused's explanation	Do not convict but consider the next steps below.
(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt	Convict.
I If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt	Acquit.

[62] In the totality of the evidence, I find that the prosecution has successfully proved its case beyond reasonable doubt against the first and second accused. For the aforesaid reasons, I find both accused have failed to raise a reasonable doubt in the prosecution's case and have failed to rebut the presumption of possession stated in s 37(d) of the Act on a balance of probabilities. I find the first and second accused guilty as per the charge preferred against them and I convict them. Accordingly, I order the first and second accused to be sentenced to death, id est to be hanged by the neck till dead, as per s 277 of the Criminal Procedure Code.

[63] *Ergo cadit quaestio.*

Both accused convicted for offence of drug trafficking and sentenced to death.

Reported by Dzulqarnain bin Ab Fatar